# YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1-25-108 OF 2001
RAMLY ALI J
25 SEPTEMBER 2002

***Administrative Law*** *— Remedies — Certiorari — Whether the applicant had locus standi to make an application for leave to apply for certiorari — Whether the application was frivolous and vexatious — Whether the first respondent failed to give reasons for his decision — Whether the grounds in the applicant's application were serious grounds — Whether the first respondent's decision amounted to a breach of the applicant's legitimate expectation — Whether the first respondent acted contrary to the principle of proportionality*

This concerned an ex parte application (encl 1) made pursuant to O 53 r 3 of the Rules of the High Court 1980 ('the RHC') for leave to apply for an order of certiorari to quash the decision of the first respondent (Datuk Bandar Kuala Lumpur) dated 11 September 2001 which approved the development to the land adjacent to the applicant's land by the second respondent (Selangor Properties Bhd) which involved the building of two blocks of 20 storey apartments with 107 units with the density of 285 persons per acre. The applicant raised the following grounds, inter alia, that the applicant had locus standi; that the application was not frivolous or vexatious; that the first respondent failed to give reasons for the decision; that the grounds for the application were serious; that there would be an increase in the density ratio in the area; that the decision amounted to a breach of the applicant's legitimate expectation and that the first respondent had acted contrary to the principle of proportionality.

**Held,** granting the applicant's application for leave as well as for stay of proceedings as prayed for in encl 1:

(1) The law on the exercise of discretion in granting leave is trite. 'The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the ground supporting the application' (*Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228). In dealing with an application for leave to apply for an order of certiorari, the court shall not go further than the leave stage and shall not embark on substantial issues on merit. The application for leave is not frivolous or vexatious when 'there are grounds to consider the allegations made by the applicant and which could

only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted'; *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 (see p 135E–H); *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319 followed.

(2) On the issue of 'locus standi', the court was satisfied that the applicant was not a mere 'busybody' as he would have been adversely affected by the decision of the first respondent to develop the land adjacent to his land as approved. The notice dated 22 August 2000 issued by the first respondent to the applicant requesting for his views on the development was sufficient evidence to show that the applicant had locus standi in respect of the application (see p 135H); *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319 followed.

(3) Having gone through the list of grounds relied upon by the applicant (as contained in the applicant's affidavit in support), the court was fully satisfied that the present application was not prima facie frivolous or vexatious. There was ample substance in the grounds supporting the application. There were grounds to consider the allegations made by the applicant and which could only be properly heard and determined on the substantive application for an order of certiorari after leave had been granted (see p 140A–B).

(4) The applicant contended that the first respondent failed to give any or adequate reason for his decision to approve the development. The 'only reason' (if the court could call it a reason) given for the approval was that the units had been reduced from 181 to 107 units with the density of 285 persons per acre. The so-called reason given by the first respondent in approving the planning permission was highly insufficient and amounted to 'no reason at all'. Without an adequate reason, the applicant had no way of knowing whether all his objections had been taken into consideration (see pp 140B–C, H–141A).

(5) The issue relating to population density in the locality of the land to be developed was a material consideration to be considered by the the first respondent in dealing with an application for planning permission, as provided under s 22(4)(b) of the Federal Territory (Planning) Act 1982. The increase of density from 30 persons per acre to 285 persons per acre was unreasonable. The first respondent should have given evidence via affidavit (in the hearing of the substantial application for certiorari) to explain the reasons for his decision. The increase of density of population in the area in question, if not rebutted would obviously be burdensome on the applicant and could be an infringement of the doctrine of proportionality. The doctrine of proportionality as

raised by the applicant may have been applicable to the present application. That doctrine could only be heard, considered and determined during a full hearing of the substantive application for certiorari (see pp 141F–H, 142F); *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 and *Niarchos (London) Ltd v Secretary of State for the Environment* (1977) 35 P & CR 259 followed.

(6) The issue of legitimate expectation was raised by the applicant in the present application. In light of the decision in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1, there are two forms of legitimate expectation, namely, the applicant was capable of having a legitimate expectation of a right to be heard before a decision is made (procedural legitimate expectation) and the applicant was also capable of having a legitimate expectation that the first respondent when making his decision, would not renege on his previous assurance or reverse his previous policy (substantive legitimate expectation). All these issues and novel points of law had to be considered and determined at the hearing of the substantial motion for certiorari (see pp 142F, 143A–B).

(7) The applicant also prayed for a stay order as per para 2 of the application and such a stay order is permissible under O 53 r 3(5) of the RHC. If the court did not direct a stay of proceedings, it meant that the second respondent could proceed to develop the said land as approved by the first respondent. This would mean that the applicant's substantive motion for certiorari would be rendered nugatory in the event he succeeded in his application (see p 143G–H).

**[Bahasa Malaysia summary**

Ini berkaitan permohonan ex parte (kandungan 1) yang dibuat menurut A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk kebenaran untuk memohon perintah certiorari untuk membatalkan keputusan responden pertama (Datuk Bandar Kuala Lumpur) yang bertarikh 11 September 2001 yang meluluskan pembangunan tanah yang bersempadan dengan tanah pemohon oleh responden kedua (Selangor Properties Bhd) yang melibatkan pembinaan dua buah pangsapuri 20 tingkat dengan 107 buah unit dengan kepadatan 285 orang seekar. Pemohon telah membangkitkan alasan-alasan berikut, antaranya, bahawa pemohon mempunyai locus standi; permohonan tersebut tidak remeh dan menyusahkan; responden pertama gagal memberi alasan-alasan untuk keputusannya; alasan-alasan permohonan adalah serius; kepadatan di kawasan tersebut akan meningkat; keputusan tersebut merupakan

pelanggaran harapan sah pemohon dan responden pertama telah bertindak bercanggah dengan prinsip keseimbangan.

**Diputuskan,** membenarkan permohonan pemohon untuk kebenaran memohon dan membenarkan penangguhan prosiding seperti yang dipohon di dalam kandungan 1:

(1) Undang-undang berkenaan perlaksanaan budibicara untuk membenarkan permohonan adalah jelas. 'The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the ground supporting the application' (*Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228). Semasa menimbang permohonan untuk kebenaran untuk memohon certiorari, mahkamah tidak patut melebihi peringkat memohon kebenaran dan tidak patut menimbang isu-isu merit. Permohonan untuk kebenaran tidak remeh dan menyusahkan memandangkan 'there are grounds to consider the allegations made by the applicant and which could only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted' (lihat ms 135E–H); *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228; *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319 diikut.

(2) Pada isu 'locus standi', mahkamah berpuas hati bahawa pemohon bukan merupakan 'busybody' kerana beliau akan terjejas oleh keputusan responden pertama untuk membangunkan tanah yang bersempadan dengan tanah pemohon seperti yang diluluskan (lihat ms 135H); *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1998] 1 MLJ 319 diikut.

(3) Setelah meneliti alasan-alasan yang dipakai oleh pemohon (seperti yang terdapat di dalam afidavit sokongan pemohon), mahkamah berpuas hati bahawa permohonan ini tidak prima facie remeh dan menyusahkan. Terdapat alasan yang amat kukuh yang menyokong permohonan tersebut. Terdapat alasan untuk menimbang pengataan yang dibuat oleh pemohon yang hanya dapat didengar dan diputuskan di dalam permohonan substantif untuk satu perintah untuk certiorari setelah kebenaran telah diberi (lihat ms 140A–B).

(4) Pemohon telah berhujah bahawa responden pertama gagal memberi sebarang alasan atau alasan yang mencukupi untuk keputusan beliau meluluskan pembangunan tersebut. Alasan yang diberi untuk kelulusan tersebut (sekira mahkamah berpendapat ia adalah alasan) adalah unit-unit tersebut telah dikurangkan daripada 181 kepada 107 unit dengan kepadatan 285 orang seekar. Alasan yang dikatakan tersebut yang diberi oleh

responden pertama tidak mencukupi dan merupakan 'no reason at all'. Tanpa alasan yang mencukupi, pemohon tidak dapat tahu sama ada kesemua bantahan beliau telah dipertimbangkan atau tidak (lihat ms 140B–C, H–141A). A

(5) Isu yang berkaitan kepadatan populasi di dalam kawasan tanah yang akan dibangunkan merupakan pertimbangan yang patut dipertimbangkan oleh responden pertama dalam memutuskan permohonan untuk keizinan perancangan, seperti yang diperuntukkan di bawah s 22(4)(b) Akta (Perancangan) Wilayah Persekutuan 1982. Peningkatan kepadatan daripada 30 orang seekar kepada 285 orang seekar tidak munasabah. Responden pertama patut memberi keterangan melalui afidavit (di dalam pendengaran permohonan substantif untuk certiorari) untuk memberi alasan bagi keputusan beliau. Peningkatan kepadatan populasi kawasan tersebut, jika tidak dipatahkan akan membebankan pemohon dan mungkin melanggar doktrin keseimbangan. Doktrin keseimbangan, seperti yang dibangkitkan oleh pemohon, mungkin terpakai di dalam permohonan ini. Doktrin tersebut hanya dapat didengar, diberi pertimbangan dan diputuskan dalam pendengaran yang penuh permohonan substantif untuk certiorari (lihat ms 141F–H, 142F); *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 dan *Niarchos (London) Ltd v Secretary of State for the Environment* (1977) 35 P & CR 259 diikut. B C D E

(6) Isu harapan sah telah dibangkitkan oleh pemohon di dalam prosiding ini. Mengikut keputusan di dalam *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1, terdapat dua jenis harapan sah, iaitu, pemohon boleh mempunyai harapan sah hak untuk didengar sebelum suatu keputusan dibuat (harapan sah berprosedur) dan pemohon juga boleh mempunyai harapan sah bahawa responden pertama, apabila membuat keputusan, tidak akan memungkiri jaminan terdahulunya ataupun kebalikan polisi terdahulunya (harapan sah substantif). Kesemua isu-isu dan perkara undang-undang yang baru ini perlu diberi pertimbangan dan diputuskan di dalam pendengaran usul substantif untuk certiorari (lihat ms 142F, 143A–B). F G

(7) Pemohon juga memohon satu perintah penangguhan seperti di dalam perenggan 2 permohonan tersebut dan perintah seperti itu dibenarkan di bawah A 53 k 3(5) KMT. Jikalau mahkamah tidak mengarah penangguhan prosiding, ini akan bermakna responden kedua boleh terus membangunkan tanah tersebut seperti yang diluluskan oleh responden pertama. Ini bermakna usul substantif pemohon untuk certiorari tidak berguna jikalau beliau berjaya di dalam permohonan beliau (lihat ms 143G–H).] H I

**Notes**

For cases on the remedy of certiorari, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue), paras 135–306.

**Cases referred to**

*Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 (folld)

*Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors and another appeal* [1992] 2 MLJ 393 (refd)

*Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 (refd)

*George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319 (folld)

*Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 (refd)

*Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 (folld)

*Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68 (refd)

*Niarchos (London) Ltd v Secretary of State for the Environment* (1977) 35 P & CR 259 (folld)

*R v Devon CC; ex p Baker & Anor* [1995] 1 All ER 73 (refd)

*R v Ministry of Agriculture Fisheries and Food; ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 (refd)

*R v Secretary of State for Education and Science, ex p Avon County Council* [1991] 1 All ER 282 (refd)

*Yian Sdn Bhd v Datuk Bandar Kuala Lumpur & Anor* [1999] 3 MLJ 605 (refd)

**Legislation referred to**

Federal Territory (Planning) Act 1982 s 22, (4)(b), (5)

Planning Development Rules 1970 rr 5, (3)(a), (5), 6

Rules of the High Court 1980 O 53 rr 2(4), 3, (a), (2), (3), (5)

*Jack Yow* (*G Rajasingam* with him) (*Shearn Delamore & Co*) for the applicant.

*Lee Yeok Choo* (*Thangaraj & Assoc*) for the first respondent.

*Steven Thiruneelakandan* (*Shook Lin & Bok*) for the second respondent.

**Ramly Ali J**:

This is an application by the applicant, made ex parte, for leave to apply for an order of certiorari to quash the decision of the first respondent dated 11 September 2001 in which the first respondent had approved the

development to the land adjacent to the applicant's land by the second respondent, which involved the building of two blocks of 20 storey apartments with 107 units with the density of 285 persons per acre.

The application (encl 1) was made pursuant to O 53 r 3 of the Rules of the High Court 1980 ('the RHC') which provides:

> (1) No application under this Order shall be made unless leave therefor has been granted in accordance with this rule.
>
> (2) An application for leave must be made ex parte to a judge in chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

The application for leave together with the statement pursuant to O 53 r 3(a) and the applicant's affidavit verifying the statement were filed on 25 October 2001. All the papers were served on the Attorney-General's Chambers on 18 January 2002. On 2 July 2002, the applicant obtained an order for amendment of the statement made by the previous judge (Abdul Aziz JCA). The amended statement was filed on 9 July 2002. The affidavit verifying the amended statement was affirmed on 19 August 2002 and filed on 20 August 2002. All these papers were also served on the Attorney-General's Chambers on 21 August 2002. The applicant has complied with O 53 r 3(3) of RHC which provides:

> The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

On the hearing date of the application (25 September 2002) there was no representative from the Attorney-General's Chambers.

*Brief facts*

The facts of this case are set out in detail in the amended statement filed pursuant to O 53 r 3(2) of the RHC. Briefly, the facts are as follows.

The land adjacent to the applicant's land was to be developed by the second respondent. The second respondent applied to the first respondent (Datuk Bandar Kuala Lumpur) for planning permission. The original plan was to develop two blocks of 20 storey apartments (181 units) with a gymnasium at roof level and three levels of car park. Residential density will be increased from 30 persons to 408 persons per acre on the said land. Notice was given on 26 August 2000 by the first respondent in the *New Straits Times* and *Utusan Malaysia* and also by way of a letter dated 22 August 2000 to the applicant regarding the proposed development. The applicant raised various objections in a letter dated 8 September 2000 and also during a meeting convened by the Pengarah Jabatan Perancang dan Kawalan Bangunan of the first respondent on 8 November 2000. The first respondent issued a notice dated 11 September 2001 which was received by

A the applicant on 27 September 2001 where by the first respondent informed the applicant that the first respondent is approving the development and granting the planning permission, but reducing the number of units from 181 to 107 with the density of 285 persons per acre.

The applicant is now seeking leave to apply for, inter alia, an order of
B certiorari to quash the decision of the first respondent dated 11 September 2001.

In seeking leave, the applicant raised the following grounds, namely:

(i) that the applicant has locus standi in respect of the application;

(ii) that the application is not prima facie frivolous or vexatious;
C

(iii) that the first respondent failed to give any or adequate reason for the said decision;

(iv) that the grounds for the application are serious and if unrebutted would result in the applicant succeeding in his application by the notice of motion for certiorari;
D

(v) that there will be an increase in population density ratio in the area;

(vi) that the decision amounts to a breach of his legitimate expectation, ie a reversal of policy by the first respondent of only approving low rise development with building below five storeys high in the area.

E (vii) that the first respondent has acted against/contrary to the principle of proportionality.

*The test for leave application*

The law on the exercise of discretion in granting leave is trite. The test was
F laid down by the Federal Court in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, where it was held at p 228 (holding 2 of the headnotes) that:

> The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some
G substance in the ground supporting the application. On the evidence in this case the appellants had prima facie an arguable case for the grant of the relief they sought.

It was also held in that case that the court, in dealing with an application for leave to apply for an order of certiorari, shall not go further than the leave
H stage and shall not embark on substantial issues on merit. The Federal Court also stressed, in that case, that the application for leave is not frivolous or vexatious when 'there are grounds to consider the allegations made by the applicant and which could only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted'.

I The same principle was also applied by the Federal Court in *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68, where Raja Azlan Shah (Ag LP) said at p 69 (holding 1 of the headnotes):

> The appellant should be granted leave to apply for an order of certiorari as the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion for certiorari. When the Federal Court grants leave, it has jurisdiction to hear the substantive motion.

At this stage of the proceedings, the court need not go into the matter in great depth. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a guided perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the substantive application (see *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617).

In considering all the above principles to the facts of the present case, the court is in full agreement with Lim Beng Choon J in *George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors* [1988] 1 MLJ 319, when he said (per curiam of the headnotes) at p 319:

> On principle and authority, the court is of the view that at this stage of the proceeding the court is required only to inquire whether the matter to be decided by the court is not in fact frivolous and vexatious in the sense that it is a trivial complaint of an administrative error by a busybody with a misguided sentiment and misconception of the law. Another requirement at this stage of the proceeding which a court has to consider is that the applicant must produce sufficient evidence to sustain a prima facie case that a public officer or authority that made the decision had acted unlawfully or that he or it had, in its exercise of the administrative discretion, acted ultra vires the power given to him or it under the relevant statute. If the court is satisfied that the applicant has complied with these two requirements, leave would usually be granted irrespective of whether the applicant has suffered no greater injury than thousands of the King's subjects.

The following issues or grounds were raised by the applicant to support his application, ie that the application is not frivolous and vexatious, and that there is some substance or sufficient evident to sustain a prima facie case.

On the issue of 'locus standi', the court is satisfied that the applicant is not a mere 'busybody' as he will be adversely affected by the decision of the first respondent to develop the land adjacent to his land as approved. The notice dated 22 August 2000 issued by the first respondent to the applicant requesting for his views on the development is sufficient evidence to show that the applicant has locus standi in respect of the application. The said notice was issued under r 5(3)(a) of the Planning Development Rules 1970 ('the Rules'), which gives registered owners of lands adjoining the land to

which the application relates the right to make objections. The applicant, having received the said notice, raised various objections in a letter dated 8 September 2000 to the first respondent. This was done in line with r 5(5) of the Rules which gives the applicant four weeks to submit his objection in writing to the first respondent. Again, in this respect, the court is in full agreement with Lim Beng Choon J in *George John* when he said at p 319 (holding 1 of the headnotes):

> In order to have the locus standi to invoke the jurisdiction of judicial review, the applicant should claim, if not a legal or equitable right, at least a sufficient interest in respect of the matter to be litigated. The extent of sufficient interest depends on diverse variable factors such as the content and intent of the statute of which contravention is alleged, the nature of the breaches of statutory power, the specific circumstances of the case, the nature and extent of the applicant's interest or grievance and the nature and extent of the prejudice or injury suffered by him.

This is further strengthened by O 53 r 2(4) of the RHC which provides:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Based on the above consideration, the court has no hesitation to hold that the applicant in the present case has locus standi to make the present application.

In order to determine whether or not the application is prima facie frivolous or vexatious, it is necessary to list out the details of the grounds relied on by the applicant (as contained in his affidavit in support). The applicant contends that the first respondent, when considering and approving the application of the second respondent:

(a) has acted without any or sufficient or reasonable grounds and/or by taking irrelevant considerations into account and/or has reached his decision in a manner that is irrational and/or has acted unreasonably or perversely and/or acted in breach of the legitimate expectation of the applicant and/or acted contrary to the principle of proportionality and/or breach of natural justice or principle of procedural fairness, including:

Particulars:

(i) failed to take into account and/or give adequate weight to the fact that Bukit Damansara is a low density residential area which is situated within a low density zoning, thus rendering the proposed development manifestly unsuitable for a low density residential area;

(ii) failed to take into account and/or give adequate weight to the fact that the Comprehensive Development Plan No 1040 and No 1041 put the density at 30 persons;

(iii) failed to take into account and/or give adequate weight to the fact that the present development would raise the density from 30 persons per acre to 285 persons per acre;

(iv) failed to take into account and/or give adequate weight to the fact that the existing width of the roads, the drainage system, the water supply and the electricity supply are all insufficient to support the proposed development;

(v) failed to make or provide sufficient plans and arrangements for widening the roads, upgrading the drainage system, water supply and electrical supply before approving the planning permission;

(vi) failed to take into account that the set-back of the existing building is too close to the edge of the road notwithstanding the present road reserve, and in view of this, that it would be impossible to widen the existing roads;

(vii) failed to take into account that the proposed development is contrary to the other types of development which have been approved in the Bukit Damansara area namely, low rise developments such as Prima Damansara, BelAir Apartments and Desa Damansara;

(viii) failed to take into account that the emergence of the development by the second respondent in the Bukit Damansara area would cause and aggravate further existing traffic, noise and environmental pollution problems;

(ix) failed to commission independent consultants to assess the impact of the proposed development on the existing drainage system, water supply, electric supply, traffic, noise and environmental degradation;

(x) failed to take into account or gave very little weight to the fact that the Bukit Damansara area will not be able to support a high density development, such as the proposed development, as the public utilities that are presently available to the area such as water supply, electricity, drainage, telephone and sewage, etc are manifestly inadequate;

(xi) failed to undertake a comprehensive traffic study for the whole of the Bukit Damansara area especially prior to approving the second respondent's planning permission, as the traffic on the roads in the Damansara area has increased considerably in recent times;

(xii) failed to take into account that with the proposed development, traffic situation in the Damansara area would invariably become chaotic and congested particularly with the recent road building and the Sprint Highway that is taking place;

(xiii) failed to consider that with the massive development of this nature, which is likely to take a number of years to complete, and

with the use of foreign labour, there is likely to be an increase in crime in that area and that security of the applicant would invariably be put in jeopardy by this development;

(xiv) failed to take into account that the office of the first respondent had previously assured that the approval of new projects above five storeys had been frozen, amongst others, in the Damansara area due to the lack of infrastructure to support such developments in those areas;

(xv) failed to give effect to the legitimate expectation of the applicant that the first respondent will not renege on its policy of only approving low-rise developments and/or developments with buildings below five storeys in the Bukit Damansara area;

(xvi) failed to give adequate or sufficient reason to justify the approval of the second respondent's application in the first respondent's notice dated 11 September 2001;

(xvii) failed to allow the applicant an opportunity to be heard in opposition to the modified development plan which has reduced the units from 181 to 107 with the density of 285 persons per acre;

(xviii) the increase in the density from 30 persons per acre to 285 persons per acre is disproportionately burdensome on the applicant. Consequently, the first respondent has gone beyond what was necessary to achieve the aim of proper planning under s 22 of the Federal Territory (Planning) Act 1982 and the Comprehensive Development Plan of Kuala Lumpur;

(xix) failed to take into account the likely threat to the physical safety of the residents of Jalan Batai, including that of the applicant, as the proposed development is situated above the applicant's parcel of land;

(b) has misconstrued the scope and effect of his statutory discretion under the whole of the Federal Territory (Planning) Act 1982 from the decision making process in respect of the decision of the first respondent dated 11 September 2001 (in particular s 22 thereof) as well as rr 5 and 6 of the Planning Development Rules 1970 and/or failed to take into account the comprehensive development plans;

(c) has unlawfully and without authority approved the second respondent's application for planning permission without taking into account any and each of the matters raised by the applicant in its grounds of objection dated 8 September 2000 or alternatively by assigning little or no weight to those matters;

(d) has failed or neglected or omitted to take into account that the infrastructure facilities of Bukit Damansara were designed and installed for a lower population density and for small scale, low rise developments;

(e) has acted in excess of or without jurisdiction or misapplied his statutory discretion under s 22 of the Federal Territory (Planning) Act 1982 and/or the Planning Development Rules of 1970. A

Having gone through the list of grounds relied upon by the applicant, the court is fully satisfied that the present application is not prima facie frivolous or vexatious. There is ample substance in the grounds supporting the application. There are grounds to consider the allegations made by the applicant and which could only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted. B

The applicant also contended that the first respondent has failed to give any or adequate reason for his decision to approve the development. The 'only reason' (if we may call it a reason) given for the approval was that the units have been reduced from 181 to 107 units with the density of 285 persons per acre. C

The requirement to give reasons can be found in s 22(5) of the Federal Territory (Planning) Act 1982 ('the FTPA'), which provides: D

> Upon the receipt of an application for planning permission the Commissioner shall within such time as may be prescribed either grant or refuse the application and when the application is granted subject to condition or refused, *the Commissioner shall give his reasons in writing for his decision.* (Emphasis added.) E

In *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17, the Court of Appeal, in dealing with s 22 of the FTPA, has said at p 30:

> It also recognizes the importance of a reasoned decision by requiring the appellant, in sub-s (5), to state his reasons when refusing an application for planning permission or when granting conditional approval. F

The importance of giving reasoned decisions was also recently endorsed by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 ('*MPPP*'), where Edgar Joseph Jr FCJ held at p 64: G

> We endorse the principles enunciated by the Privy Council in *Dr Stefan* [*Dr Stefan v The General Medical Council* (The Times of London, 8 March 1999)] and say that in the exceptional circumstances of this case and having regard to the trend towards increased openness in matters of Government and administration as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition. H

In the present case, the court agrees with the applicant that the so-called reason given by the first respondent in approving the planning permission is highly insufficient and may amount to 'no reason at all'. Without giving an I

A adequate reason, the applicant has no way of knowing whether all his objections have been taken into consideration.

The grounds in support of the present application are also similar to the grounds cited in *Yian Sdn Bhd v Datuk Bandar Kuala Lumpur & Anor* [1999] 3 MLJ 605. Leave was granted in that case and the learned judge B was of the view that the grounds were 'serious' and 'if unrebutted it would result in the applicant succeeding in its application by the notice of motion for certiorari'.

In the present application, after going through all the grounds cited by the applicant, this court is also of the view that those grounds are really C serious and if unrebutted, would result in the application for an order of certiorari being granted, and therefore, leave should be granted.

The issue on the increase in population density as raised by the applicant, also deserves consideration in the present application. Examples of other cases where leave was granted in respect of challenges to planning permission that had increased the density of the population ratio of the area D are as follows: *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin*; and *Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors and another appeal* [1992] 2 MLJ 393. In the present application, the development will result in an increase of population density from 30 persons per acre to 285 persons per acre. In *Datin Azizah bte Abdul Ghani*, the Supreme Court had issued certiorari to quash the development E on the ground that the development would increase the population density from 10 persons to 44 persons an acre. In *Zain Azahari bin Zainal Abidin*, the Court of Appeal had confirmed the decision earlier made by the High Court granting certiorari to the applicant on grounds, inter alia, that the proposed development involved an increase in the population density ratio F of the locality from 11 persons per acre to 56 persons per acre.

Based on those authorities, it seems clear that the issue relating to population density in the locality of the land to be developed is a material consideration to be considered by the Datuk Bandar (the first respondent) in dealing with an application for planning permission, as G provided under s 22(4)(b) of the FTPA, which provides that 'the Commissioner shall as far as practicable have regard to — (b) any other material consideration'.

In the present application, prima facie, the increase of density from 30 persons per acre to 285 persons per acre is unreasonable. The first respondent should give evidence via affidavit (in the hearing of the H substantial application for certiorari) to explain the reasons for his decision. The ten times increase of density of population in the area in question, if not rebutted would obviously be burdensome on the applicant and can be an infringement of the doctrine of proportionality, which has been accepted in Malaysia via *MPPP*. In that case (*MPPP*), the Federal I Court said at p 66:

> It was no less an authority than Lord Diplock in the celebrated case of *Council of Civil Service Unions & Ors v Minister of the Civil Service* [1985]

> AC 374 ('the *GCHQ* case') who, in classifying three grounds for judicial review, alluded to a possible fourth ground of 'proportionality'. Proportionality, of course, embodies a basic principle of fairness and we can see this principle at work in a number of English cases to which we shall presently refer, and we might as well interpolate, to add that the doctrine was referred to as a ground for judicial review by Edger Joseph Jr FCJ in *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 at pp 472–474.

The case of *Niarchos (London) Ltd v Secretary of State for the Environment* (1977) 35 P & CR 259 affords a clear example of the doctrine of proportionality being used as a tool to test the validity of planning permission. In that case, it was held by the court that it was unreasonable for the Secretary of State to insist on the implementation of a policy that would be 'unreasonably burdensome' to the applicant. So, in *MPPP*, at pp 66–67, the Federal Court added:

> So here we see proportionality being used as a tool to test the validity of a refusal of planning permission. In particular, in determining whether the discretionary power to grant or refuse planning permission had been exercised improperly or mistakenly the court carried out a balancing exercise and concluded that because the company would have had to shoulder a disproportionate burden albeit in the implementation of a legitimate planning goal, the exercise of the power was rendered ultra vires.

The Federal Court concluded at p 67:

> In our view, upon the background facts, as found by the Court of Appeal, with which we concur, and the applicable law, the severity of the requirements of the disputed condition would be out of all proportion to the extension of planning permission sought.

Based on the above authorities, this court is of the view that the doctrine of proportionality as raised by the applicant may be applicable to the present application. That doctrine can only be heard, considered and determined during a full hearing of the substantive application for certiorari.

The issue of legitimate expectation was also raised by the applicant in the present application. In raising the issue, the applicant highlighted the fact that the granting of the said planning permission by the first respondent appears to be a reversal of policy by the first respondent of only approving low-rise developments or developments with buildings below five storeys in Bukit Damansara. The applicant is contending that this amounts to a breach of his legitimate expectation.

The Federal Court in *MPPP* had chosen to depart from the English law which so far has confined legitimate expectation to merely having an impact on the procedure and not the merits or substance of the decision. In *MPPP*, the Federal Court preferred the view of Simon Brown LJ in *R v Devon CC; ex p Baker & Anor* [1995] 1 All ER 73, at pp 88–89; and Sedley J in *R v Ministry of Agriculture Fisheries and Food; ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 at pp 723–724, as showing that the concept of

A legitimate expectation has not only an impact on procedure but also a substantive impact. In light of the decision in *MPPP*, there are two forms of legitimate expectation, namely, the applicant is capable of having a legitimate expectation of a right to be heard before a decision is made (procedural legitimate expectation) and the applicant is also capable of having a legitimate expectation that the first respondent when making his B decision, will not renege on his previous assurance or reverse his previous policy (substantive legitimate expectation). All these issues and novel points of law need to be considered and determined at the hearing of the substantial motion for certiorari.

In the event this court grants leave to apply for certiorari, the applicant C also prays for a stay order as per para 2 of the application.

Such a stay order is permissible under O 53 r 3(5) of the RHC, which provides:

> The grant of leave under this rule, shall not, *unless the judge so directs*, operate as a stay of the proceedings in question. (Emphasis added.)

D

The phrase 'a stay of the proceedings' must have a wider application. It is not confined to proceedings in a court only. Today, many applications for judicial review are for orders of certiorari to quash decisions of decision making bodies other than courts, including government ministers, local authorities and other bodies whose decisions are susceptible to judicial E review. Thus the phrase 'a stay of the proceedings' in relation to such bodies must mean 'a stay of the process by which the decision challenged has been reached, including the decision itself' (see *R v Secretary of State for Education and Science, ex p Avon County Council* [1991] 1 All ER 282). Judicial review, by way of an application for certiorari, is a challenge to the way in which F decision has been arrived at.

The decision maker may appear to argue that his or its decision was reached by an appropriate procedure. Thus, as had been decided in *ex p Avon County Council*, a decision made by an officer or minister of the crown as well as other relevant decision making bodies can, in principle, be stayed by an order of the court. That the court should have the power to order a G stay of a decision of a decision making body pending the conclusion of a challenge to the decision making process by way of judicial review. In the present application, if the court does not direct a stay of proceedings as prayed by the applicant (as in para 2 of encl 1), it means that the second respondent can proceed to develop the said land as approved by the first H respondent. This would mean that the applicant's substantive motion for certiorari would be rendered nugatory in the event he succeeded in his application.

*Conclusion*

I At this stage of the proceedings, the court is satisfied that the matter to be decided is not frivolous or vexatious; and that the applicant has produced sufficient evidence or some substance in his grounds supporting the

application. Therefore the court grants the applicant's application for leave as well as for stay of proceedings as prayed in encl 1. A

*Applicant's application for leave as well as for stay of proceedings as prayed for in encl 1 granted.*

Reported by Chew Phye Ken B

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